Petition

Office Supreme Court, U.S.
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81-407

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ROBERT LEE JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

W. MICHAEL MAYOCK
Suite 2600
10100 Santa Monica Blvd.
Los Angeles, California
90067
(213) 552-1465

Attorney for Petitioner

QUESTION PRESENTED

Where the credibility of an unindicted and alleged accomplice witness is the key to the prosecution's case does the restriction of a defendant's right to test that credibility by exploring the motivation for testifying, by asking leading questions and by bringing to light lies earlier told by the witness first to the government and then to the court at a voluntariness hearing from which the trial judge excluded the defendant constitute a denial of the Sixth Amendment right of confrontation?

PARTIES TO THE PROCEEDING

In addition to Petitioner herein the other parties to the proceeding in the court below are Jeffery Joseph Mailliard, Michael Allen Fagan and Joseph Gary Fagan. The Fagans have filed a joint Petition for Certiorari which has been designated by Docket Number 81-324.

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit was filed on May 22, 1981, and appears as Appendix A. At present this opinion is unpublished, although all parties thereto have requested its publication and a motion to that effect has been filed but has not yet been acted upon by the Ninth Circuit.

JURISDICTION

The judgment of the Court of Appeals for the Nin h Circuit was entered on May 22, 1981. A timely petition for rehearing was denied on July 1, 1981. A copy of the order denying said petition appears as Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the Sixth Amendment to the United States Constitution are:

> "In all criminal prosecutions, the accused shall enjoy

> the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

On October 3, 1979, an indictment was filed in the Central District of California charging in two counts Petitioner Jones and five others with violations of federal controlled substance laws. (C.R. 1).[1] Count One charged a conspiracy to import cocaine, a Schedule II controlled substance into the United States in violation of

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1. "C.R." refers to the Clerk's Record on Appeal and is followed by the document number as designated on the computerized docket sheet.

Title 18, United States Code, Sections 846 and 841(a)(1). Only Petitioner Jones was tried by jury and on February 28, 1980, the jury returned a verdict of guilty on both Counts. (2R.T. 312)[2].

The prosecution's primary witness against Petitioner Jones was David Keller, an alleged accomplice who was not indicted. Keller had been arrested in Panama by Panamanian customs officials on April 21, 1979, with approximately 1,000 grams of cocaine secreted in his boots. (1R.T. 96). After being arrested, Keller was beaten by the Panamanians and threatened with lengthy incarceration in a notorious Panamanian prison. (1 R.T. 97, 120). Subsequently, Keller was "rescued" by DEA agents who took custody of Keller in Panama, transported him to Guatemala, and who subsequently

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2. "R.T." refers to the Reporter's Transcript of the Record on Appeals and is preceded by the applicable volume number.

persuaded Keller to place several recorded telephone calls to Defendants Michael Fagan, Joseph Fagan, and Jefferey Mailliard. (1 R.T. 101-108). DEA agents subsequently transported Keller back to the United States, and thereafter several other calls to Defendants Michael Fagan, Joseph Fagan, and Jefferey Mailliard (but none to Petitioner Jones) were made by Keller and recorded by the DEA agents. (1 R.T. 109). Prior to his arrest in Panama, Keller had neither seen nor spoken to Petitioner Jones in several months, nor did Keller have any further contact with Jones after his arrest. (1 R.T. 70, 2 R.T. 231).

According to Keller, his first contact with Petitioner Jones occurred on February 13, 1979, at a motel in Claremont, California. (1 R.T. 50). The apparent purpose of this meeting, according to Keller, was to discuss the details of a trip to South America with Jones and Defendant Joseph

Fagan. Petitioner Jones testified that his first meeting with Keller occurred at the Ontario Airport when Jones was introduced to Keller by Defendant Joseph Fagan.

Both Keller and Petitioner Jones testified that they rode together on a flight to Panama on February 14, 1979. (1 R.T. 57, 2 R.T. 228). Keller testified that during the course of this flight, Jones gave Keller some cocaine to ingest. Jones denied having cocaine in his possession during the flight into a foreign country. (1 R.T. 60, 2 R.T. 228). Additionally, only Keller used a fictitious name on a flight and Keller brought the test kit for cocaine in his own luggage although he claims Petitioner Jones had to show him how to use it. (1 R.T. 58, 115).

Keller related that upon their arrival in Peru, he and Petitioner Jones stayed at the same hotel in order to contact certain individuals from whom cocaine could be pur-

chased. Petitioner Jones testified that he and Keller shared a hotel room only to save money, and further that the purpose of Jones' trip was to investigate the feasibility of founding a rug importing business. Various llama rugs purchased by Jones on the trip were introduced as exhibits. (2 R.T. 224-28).

Keller testified that he and Jones in fact purchased a quantity of cocaine and secreted it inside a pair of boots worn by Keller. According to Keller, Jones had recently smuggled cocaine in his manner. Petitioner Jones, testifying that he had been unable to wear boots like the ones identified by Keller since July of 1978 when he had undergone major ankle surgery, exhibited a massive surgical scar running from foot to mid-calf and a special boot with metal supports he wore. (2 R.T. 70, 236-38). Jones specifically denied that he purchased any cocaine whatsoever during his stay in

Peru with Keller (2 R.T. 230). Keller, a science and mathematics teacher prior to his trip to Panama (1 R.T. 138), said that Petitioner Jones, a truck driver, had shown Keller how to perform certain chemical tests to determine the quality of cocaine (1 R.T. 69). Moreover, Keller said Petitioner Jones purchased the cocaine although Keller spoke Spanish and Jones did not. (1 R.T. 117, 2 R.T. 230). No cocaine allegedly purchased by Petitioner Jones was ever recovered.

On cross-examination of Keller, Petitioner Jones sought to elicit testimony regarding Keller's statement that not being extradited to Panama was of paramount importance to Keller. (1 R.T. 118). Keller testified that he had been very concerned about being sent back to Panama. (1 R.T. 119). The Court, citing its findings at a prior hearing on the voluntariness of Keller's consent from which Petitioner

was excluded on standing grounds, refused to permit inquiry into the basis of Keller's fear of extradition, namely, his fear of future beatings and mistreatment in Panama. (1 R.T. 120).[3]

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3. The following discussion and argument were had outside of the hearing of the jury.

> "MR. MacINTYRE: Your Honor, excuse me a minute, I think we ought to have a ruling. Mr. Mayock is obviously trying to elicit from the witness the fact that he was beaten up in Panama by every means possible to get him to splurt it out on the stand, and I think your Honor ought to have a ruling on that or some basis for these questions, because this little fishing expedition that Mr. Mayock is engaging in on these vague questions to try to get Mr. Keller to obviously go into that area could be fruitful, and I really think it's improper to just poke around to try to get an answer.
>
> THE COURT: It does seem you've established through this witness that he is of the firm belief that if he testified truthfully, he will not be prosecuted, either in the United States or in Panama, and if I can attempt to paraphrase his most

Petitioner Jones sought unsuccessfully to ask Keller whether he had previously testified in the case involving the other Defendants, and whether any government agent had suggested that perjury charges would be filed against Keller if he did not testify convincingly against Petitioner Jones. (Id.). The jury was excused and Petitioner was allowed to cross-examine Keller. Keller's testimony under these circumstances revealed that he was very concerned about possible perjury charges being filed against him if he failed to testify convincingly. Specifically, Keller gave the following responses in reply to questions propounded by the Court.

> recent testimony, that, in essence, he doesn't feel under any circumstances that he will be returned to Panama for prosecution, and that seems to the Court to make irrelevant what occurred in Panama, particularly in view of the prior hearings that we've had and the determination that his consent thereto was voluntary. (emphasis added). (1 R.T. 120).

"THE WITNESS: Well, I got -- I had a discussion today with the two agents upstairs, and they just said that if I don't act too convincing, if I don't act convincing enough to the jury, there's a chance the prosecuting attorneys might get mad, and they might go back and look through every statement that I've made. And you'll just have to take that the way it goes, your Honor. I've already complained to MacIntyre about it. But that's the way I took that discussion. And as far as it goes, that's about the only time that that ever happened. (Emphasis added)."

* * *

"THE COURT: All right. Now, has anybody told you or threatened you that you might be prosecuted for perjury? Has that suggestion been made to you in any way? Up till today.

THE WITNESS: Before today?

THE COURT: Well, up till today or before today, it doesn't matter what.

THE WITNESS. Before today, no, but today I started to feel a little bit scared that if I came in here and I didn't go -- and didn't go the whole way and try to -- you know, if I don't sit up straight and be really convincing and everything. It's not the method -- it's the method that I talk. So I started to worry that

I couldn't come in here and act sloppy and et cetera, or, you know, act not -- unconvincing, then there was a chance, according to these -- this agent, right. (Emphasis added.)

THE COURT: All right.

THE WITNESS: But other than that, nothing else. Nothing else earlier.

THE COURT: Okay, thank you." (1 R.T. 129-130).

The jury, however, as the ultimate judges of Keller's credibility, were never given the opportunity to hear this testimony. Rather, their perception was limited to hearing the responses flowing from the two non-leading questions which defense counsel was permitted to ask concerning Keller's motivation for testifying:

"Did you have a conversation with two agents of the Drug Enforcement Administration?"

"What did they tell you." (1 R.T. 136-137).

On March 24, 1980, the Honorable Malcolm M. Lucas, United States District

Judge, sentenced petitioner to concurrent three year terms of imprisonment and to a special parole term of three years. On April 1, 1980, petitioner filed a timely Notice of Appeal. (C.R. 3). Petitioner duly filed his appellate briefs in the Court of Appeals. The judgment of the District Court was affirmed on May 22, 1981. A timely petition for rehearing was denied on July 1, 1981.

REASONS FOR GRANTING THE WRIT

WHERE THE CREDIBILITY OF AN UNINDICTED AND ALLEGED ACCOMPLICE WITNESS IS THE KEY TO THE PROSECUTION'S CASE THE RESTRICTION OF A DEFENDANT'S RIGHT TO TEST THAT CREDIBILITY BY EXPLORING THE MOTIVATION FOR TESTIFYING, BY ASKING LEADING QUESTIONS AND BY BRINGING TO LIGHT LIES EARLIER TOLD BY THE WITNESS FIRST TO THE GOVERNMENT

AND THEN TO THE COURT AT A VOLUNTARINESS HEARING FROM WHICH THE TRIAL JUDGE EXCLUDED THE DEFENDANT CONSTITUTES A DENIAL OF THE SIXTH AMENDMENT RIGHT OF CONTRONTATION.

The language and conclusions of the Memorandum Opinion of the Ninth Circuit serve well to prove Petitioner's contended constitutional error. Accordingly that Opinion will be the focal point herein.

To support its conclusion that the restrictions on cross-examination in this case were not an abuse of discretion the Ninth Circuit Memorandum Opinion cites three analogous cases which support Petitioner Jones' position. (Appendix A at 17-18). These three cases reversed convictions obtained when Sixth Amendment confrontation rights were denied. One of these cases Burr v. Sullivan, 618 F.2d 583 (9th Cir. 1980) is particularly apposite. Therein the Ninth Circuit declared:

"We have repeatedly held that when the Government's case turns on the credibility of a witness, then '[d]efense counsel . . . must be given a maximum opportunity to test the credibility of the witness.' Such wide latitude in cross-examination is especially appropriate when the key witness is an accomplice of the accused." Id. at 587 (citations omitted).

The Memorandum Opinion illustrates in several places that informant Keller's credibility was suspect with respect to an alleged beating inflicted upon him by the Panamanians and statements he attributed to DEA agents. The Memorandum Opinion states:

(1) "Keller's credibility was weakened by the fact that he waited about two weeks before mentioning the alleged beating to anyone." (Appendix A at 7).

(2) "Moreover, in evaluating Keller's credibility the trial court could properly consider that Keller had a motive for claiming coer-

cion. . . . (Appendix A at 7).

(3) "[T]here is little evidence that Keller was beaten at all . . . . (Appendix A at 7-8).

(4) "As for Knapp (DEA agent), he denied making the 'goal in life' statement (which Keller claimed he made, namely that Knapp said Keller's "goal in life is to get somebody down to Guatemala") . . . . (Appendix A at 9).

Petitioner Jones sought to show that informant Keller either lied about being beaten in Panama, or that, if he were beaten, his fear of being returned to Panama for additional physical abuse colored his testimony. The district judge, however, held it was "irrelevant what occurred in Panama, particularly in view of the prior hearings that we've had and the determination that his consent thereto was voluntary." (1 R.T. 120). Accordingly, Petitioner Jones

was precluded from attempting to prove Keller to be a liar, as the Memorandum Opinion demonstrates he was. Petitioner was likewise prejudiced by being prevented from demonstrating "that part of Keller's motivation in cooperating with DEA was his fear of exposure to generally inhumane conditions, including physical abuse, if he were jailed in Panama." Appendix A at 10. A fortiori, Petitioner Jones was not given an opportunity to cross-examine informant Keller at the voluntariness hearing because the court excluded Petitioner Jones from this hearing on the ground that he lacked standing. The district court was clearly wrong when it ruled its finding of voluntariness in the hearing precluded Petitioner from inquiring into Keller's motivations and bias at trial. Not only was Petitioner denied his confrontation rights, but voluntariness is subject to retesting at trial where there exists a different standard of proof namely, proof

beyond a reasonable doubt.

The court's rulings also prevented Petitioner Jones from testing the "goal in life" statement Keller claimed DEA Agent Knapp made, but which Knapp denied.

The circumstances surrounding informant Keller's cross-examination, or lack thereof, are analogous to those presented in Davis v. Alaska, 415 U.S. 308. The prosecution's chief witness at Davis' trial was on probation from a previous juvenile conviction for burglary. Prior to the taking of this witness' testimony, the prosecution moved for a protective order to prevent any inquiry by Davis into the juvenile record of the witness on cross-examination. The trial court granted the prosecution's motion despite Davis' argument that by questioning the witness regarding his prior record, he would show that the witness might be subject to undue pressure from the police since he was still on court-ordered proba-

tion.

In reversing Davis' conviction, the Supreme Court held:

> "We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness, or, as the prosecutor's objection put it, a 'rehash' of prior cross-examination. Davis v. Alaska, supra, at 318.

In the case at bar, Petitioner Jones was relegated to a position similar to that of Davis when he was permitted to ask only two questions regarding informant Keller's perjury, or possibly being sent back to Panama for trial and incarceration. The

district judge, outside the presence of the jury, extensively limited the form of the cross-examination questions so that only non-leading questions could be asked. (1 R.T. 128, 133-36). Thus, Petitioner found himself in a position of being able to ask Keller whether he was biased, but unable to inquire why he was biased. Further, when the trial court sustained the government's objection to questions regarding Keller's treatment in Panama or possible indictment for perjury, the jury may well have thought that defense counsel was engaged in a speculative and baseless attack on informant Keller.

Pointer v. Texas, 380 U.S. 400 also presented an issue regarding cross-examination similar to that raised in the instant case. In Pointer, the state introduced the preliminary hearing transcript of a crucial witness' testimony at the defendant's trial. The witness himself never testified. This

Court held that procedure violated the defendant's Sixth Amendment rights, so ruling "(b)ecause the transcript of Phillips' statement offered against petitioner at his trial had not been taken at a time and under circumstances affording petitioner through counsel an adequate opportunity to cross-examine Phillips." Pointer v. Texas, supra, at 407. In the case at bar, as in Pointer, the testimony of informant Keller regarding his motivations for testifying against Petitioner Jones was taken at a pre-trial hearing on the issue of the voluntariness of consent from which Jones was excluded. When Petitioner through his counsel, sought to explore this area on cross-examination, he was prevented from doing so by the trial court apparently because the court felt this issue had been adequately resolved in the pre-trial hearing. This procedure caused Petitioner Jones to be denied his Sixth Amendment right to con-

front and fully cross-examine Keller. A denial of the right of effective cross-examination is "constitutional error of the first magnitude and no amount of want of prejudice would cure it." Davis v. Alaska, supra, at 318, citing Brookhart v. Janis, 384 U.S. 1, 3 and Smith v. Illinois, 390 U.S. 129, 131.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

W. MICHAEL MAYOCK
Attorney for Petitioner.

APPENDIX A

FILED
May 22, 1981
RICHARD H. DEANE
Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
JEFFERY JOSEPH MAILLIARD,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
MICHAEL ALLEN FAGAN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
JOSEPH GARY FAGAN,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
ROBERT LEE JONES,
Defendant-Appellant.

No. 80-1190

D.C. CR 79-806 MML

No. 80-1191

M E M O R A N D U M

No. 80-1192

No. 80-1193

Argued and Submitted--April 6, 1981

Appeal from the United States District Court
for the Central District of California
Honorable Malcolm M. Lucas, Presiding

BEFORE: FLETCHER, PREGERSON, and REINHARDT,

Circuit Judges.

Each appellant in these consolidated cases was convicted of conspiracy to import cocaine, in violation of 21 U.S.C. §§ 963 and 960(a)(1), and conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. §§ 846 and 841(a)(1). Appellants challenge these convictions. For the reasons set out below, we reject all of appellants' challenges and affirm the

convictions.

I. Keller's Consent

Mailliard and the Fagans were tried by the court; Jones received a separate jury trial. At both trials, tapes and transcripts of telephone conversations between various appellants and David Keller, an unindicated co-conspirator who testified for the government, were admitted into evidence. Appellants argue that their pretrial motion to suppress those tapes and transcripts should have been granted because the parties to the phone conversations did not consent to their interception, as required by 18 U.S.C. § 2511(2)(c).[1] The government's position is that Keller consented to the monitoring and recording of these conversations. Appellants contend that Keller's consent was not voluntary but was extorted by physical abuse and psychological threats.

Keller was arrested by Panamanian authorities on April 21, 1979 at the airport in Panama City after he was found to have 1000 grams of cocaine secreted in the oversized boots he was wearing. He was interrogated for approximately thirty minutes by Octavio Rodriguez, chief of the narcotics section of Panamanian customs, and was then visited by DEA Agent John McFarland, who gave Keller a Miranda warning and questioned him after Keller signed a consent-to-interview form. During McFarland's questioning, Keller outlined appellants' cocaine-smuggling operation, for which he said he was a courier, and agreed to place the first of the recorded phone calls. Continuing to cooperate with the DEA, Keller was later taken to Guatemala to arrange a controlled buy; when this failed, he was returned to Los Angeles. Further recorded phone conversations took place while Keller was in Guatemala and the United States.

Appellants allege that Octavio Rodriguez beat Keller during the initial interrogation and that the DEA exploited this beating by threatening to leave Keller with the Panamanians unless he agreed to assist the DEA investigation. The alleged beating, the threats, and Keller's continuing fear that he could be extradited to Panama if he ceased cooperating render his consent to record the phone conversations not voluntary, according to appellants.

The trial court, in denying appellants' motion to suppress, found that Keller's consent was voluntary. It found that there was "no persuasive, objective evidence of any physical mistreatment" of Keller, and that even if such abuse occurred, "there was no knowledge of such by any of the DEA agents involved, and certainly no participation and no condoning," nor any "conscious avoidance of facts which would have led them" to such knowledge. These findings will be

reversed only if our independent examination of the record--viewing the evidence in the light most favorable to the government --reveals them to be clearly erroneous. United States v. Henry, 615 F.2d 1223, 1230 (9th Cir. 1980). Our examination of the record convinces us, on the contrary, that the trial court's findings were by no means clearly erroneous but were supported by substantial evidence.

During the hearing on appellants' motion to suppress, Keller testified that while questioning him Rodriguez beat him twelve to fifteen times on the soles of his feet with a stick roughly as long, and twice as thick, as a yardstick. This testimony was the only evidence of any physical abuse. No Americans were present during the alleged beating, and Octavio Rodriguez, whose deposition was taken, denied having struck Keller. DEA Agent McFarland, who interviewed Keller immediately after the

beating allegedly occurred, saw no bruises or scars, nor did Agent Sedillo, McFarland's DEA superior in Panama, who saw Keller briefly about four hours after the supposed beating. Keller himself admitted that the alleged beating produced no bruises, bleeding or swelling, "[n]o significant problem" in walking, and no nausea or vomiting.

Keller's credibility was weakened by the fact that he waited about two weeks before mentioning the alleged beating to anyone. He said nothing about it to McFarland, who supposedly arrived just after the beating, nor to Sedillo, nor to Roger Knapp, the DEA agent in Guatemala. Moreover, in evaluating Keller's credibility the trial court could properly consider that Keller had a motive for claiming coercion--to deflect his co-conspirators' anger by excusing his cooperation with the government as the product of duress.[2]

Since there is little evidence that

Keller was beaten at all, a fortiori there is little evidence that the DEA knowingly took advantage of such an alleged beating by threatening to return Keller to Panama if he ceased cooperating.[3] Indeed, even assuming Keller was beaten, there is no evidence that the DEA had any knowledge of this until Keller mentioned it when he returned to the United States some two weeks after the alleged event. Keller told the agents in Panama and Guatemala nothing about any beating and bore no signs of mistreatment. Agents McFarland and Sedillo both testified that they knew of no comparable instances of Panamanian abuse of American citizens there.

Keller himself testified that he regarded only two DEA actions as attempts to coerce him into cooperation. One was McFarland's statement, when he arrived at the Panamanian customs office to interview

Keller after the alleged beating, that he was present solely "at the graces of the Panamanian authorities" and would have to leave Keller with the Panamanians if Keller did not wish to talk with him. The other occurred in Guatemala, when, according to Keller, DEA agent Knapp told him "it was my goal in life to get somebody down to Guatemala" and that otherwise Keller could go to jail in Guatemala.

In view of the evidence, already discussed, that McFarland knew nothing of any beating by the Panamanians, we decline to view his statement as a veiled threat rather than as a simple statement of fact. As for Knapp, he denied making the "goal in life" statement, and on appeal this evidentiary conflict must be resolved in favor of the government. Knapp did acknowledge passing on to Keller the Guatemalans' statement that they would consider bringing (unspecified) charges against Keller if no co-

conspirator arrived from the United States, but we do not view this statement as sufficient to vitiate Keller's consent. Certainly it had no effect on the voluntary nature of the calls that had already been made or those recorded after Keller returned to the United States, and it is once again difficult to decide whether Knapp was deliberately threatening Keller or legitimately giving him accurate information.

It is true that part of Keller's motivation in cooperating with the DEA was his fear of exposure to generally inhumane conditions, including physical abuse, if he were jailed in Panama.[4] But persons caught in criminal activity in the United States who agree to cooperate with the police or the prosecution normally do so in the hope of minimizing or avoiding imprisonment in this country, which can often involve harsh conditions. Cooperation motivated by a co-conspirator's desire to avoid or

reduce possible imprisonment is not ipso facto involuntary. United States v. Brandon, 633 F.2d 773 (9th Cir. 1980); United States v. Ryan, 548 F.2d 782 (9th Cir.), cert. denied, 429 U.S. 939 (sub nom. Zeldin v. United States) and 430 U.S. 965 (1977).

II. Other Contentions Raised by Mailliard and the Fagans

A. Alleged DEA misconduct. Appellants cite a number of statutes and regulations and argue that they were violated by the actions of the DEA agents involved with Keller, so that the transcripts and tapes of Keller's phone conversations should be suppressed. These arguments are without merit.

The Mansfield Amendment, 22 U.S.C. § 2291(c)(1), was not violated because the DEA took no part in "direct police arrest action" against Keller. The State Department consular handbook that appellants cite

does not, on its face, apply to DEA agents, and appellants offer no convincing argument to the contrary. No violation of Panamanian or Guatemalan law has been established, nor do appellants state any reason for believing that the DEA violated Executive Order No. 12036. Finally, as to the DEA guideline concerning prior Justice Department authorization for "consensual electronic surveillance," appellants never responded to the evidence indicating that such phrase does not include monitoring telephone calls. Even if prior approval was required for the recordings, failure to obtain it would not bring the exclusionary rule into play. United States v. Caceres, 440 U.S. 741 (1979).

B. Alleged prosecutorial misconduct. Having reviewed the record, we are persuaded that none of the alleged acts of prosecutorial misconduct warrant either reversing appellants' convictions or dismissing the indictment.

For example, appellants contend that the government's failure to inform the grand jury of Keller's alleged perjury mandates dismissing the indictments, under the rule of United States v. Basurto, 497 F.2d 781 (9th Cir. 1974). Basurto held that due process is violated by "an indictment which the government knows is based partially on perjured testimony, when the perjured testimony is material, and when jeopardy has not attached." 497 F.2d at 785 (emphasis added). In the instant case Keller's challenged statements concerned a matter completely peripheral to the basis for the indictment. They were not material.

Moreover, appellants argue that they sought to interview Keller but that the prosecution advised Keller not to cooperate. The portion of Keller's testimony which they cite, however, does not support this contention. Indeed, defense counsel explicitly withdrew their pretrial motion

to dismiss for inability to interview Keller "in light of the fact that Mr. Keller has met with counsel for the defense on various occasions." RT 893-94.

C. Alleged improper limit on discovery. On February 4, 1980, the trial court filed an order quashing subpoenas duces tecum which appellants had served on the United States Attorney, the Attorney General, the Secretary of State, and the Director of Central Intelligence. Challenging this action, appellants argue that the convictions should be reversed and the case remanded to allow further discovery concerning the existence of a "joint venture" between the DEA and the Panamanian and Guatemalan narcotics authorities.

Appellants, however, have presented little credible evidence that Keller was ever beaten, as discussed in section 1A supra. If, as the district court found, no physical abuse occurred, then the degree of

cooperation between the DEA and the Latin Americans is irrelevant: a "joint venture" is significant only insofar as it would permit imputation of Panamanian (or Guatemalan) misconduct to the DEA. Accordingly, we reject appellants' argument.

III. Contentions Raised by Jones

A. Standing to contest Keller's consent. Appellant Jones joined in his co-defendants' pretrial motion to suppress the tapes of Keller's phone conversations and unsuccessfully renewed his objection at trial. The government contends, and the trial court ruled, that Jones had no standing to attack as involuntary Keller's consent to record the conversations. That ruling is correct.

The controlling statute, 18 U.S.C. § 2518 (10(a), permits "[a]ny aggrieved person" to move to suppress recorded phone conversations. An "aggrieved person" is defined as one "who was a party to any intercepted wire or oral communication

or . . . against whom the interception was directed." 18 U.S.C. §2510(11). The legislative history reveals that this definition was intended to reflect the law on Fourth Amendment standing that existed when the statute was enacted.[5] S. Rep. No. 1097, 90th Cong., 2d Sess., reprinted in [1968] U.S. Code Cong. & Ad. News 2112, 2179-80. Under that law, a defendant was not permitted to assert the Fourth Amendment rights of another. Alderman v. United States, 394 U.S. 165 (1969). Accordingly, this circuit has held that "a defendant may move to suppress the fruits of a wire-tap only if . . . he was a participant in an intercepted conversation, or if such conversation occurred on his premises." United States v. King, 478 F.2d 494, 506 (9th Cir.), cert. denied, 414 U.S. 846 (sub nom. Light v. United States)(1973) and 417 U.S. 920 (1974); accord, United States v. Jabara, 618 F.2d 1319, 1326 (9th Cir. 1980). Since

Jones was neither a party to one of the intercepted conversations nor a person on whose premises any of these conversations occurred, he has no standing to challenge the admission against him of the tapes and transcripts of the conversations.

B. Restrictions on Cross-Examination. Jones contends that the trial court's restrictions on his cross-examination of Keller violated his Sixth Amendment confrontation right and foreclosed an effective defense. We recognize the need for wide latitude in cross-examination where a key prosecution witness is an accomplice of the accused. Burr v. Sullivan, 618 F.2d 583, (9th Cir. 1980). Nevertheless, we owe deference to the trial court's "broad discretion concerning the proper extent of cross-examination." Chipman v. Mercer, 628 F.2d 528, 531 (9th Cir. 1980). Here, that discretion was not abused. The permitted cross-examination gave the jury "sufficient

evidence to appraise the biases and motivations of the witness" and the trial court thus did not abuse its discretion. United States v. Bleckner, 601 F.2d 382, 385 (9th Cir. 1979).

C. Sufficiency of the evidence. Jones argues that the evidence was insufficient to support his conviction on either count. He relies chiefly on this circuit's rule that "the uncorroborated testimony of an accomplice is sufficient evidence upon which to base a conviction if the testimony 'is not incredible or unsubstantial on its face.'" United States v. Sigal, 572 F.2d 1320, 1324 (9th Cir. 1978). Jones contends that Keller's testimony was both uncorroborated and incredible. He is wrong on both points.

First, Keller's testimony was corroborated by other witnesses, by the recorded phone calls, and by documentary evidence such as passport entries, airline tickets, and hotel and motel registrations. Second,

Keller's testimony was not incredible, For example, contrary to Jones' assertion, it is not incredible that a man with two college degrees like Keller knew less than Jones, a truck driver, about testing the purity of cocaine. Keller's degrees were in economics and environmental studies.

Jones also asserts that the government's evidence establishes at most that he participated in a cocaine purchase in Peru. This understates the force of the evidence. We must view that evidence in the light most favorable to the government. United States v. Grayson, 597 F.2d 1225, 1229 (9th Cir.), cert. denied, 100 S.Ct. 153 (sub nom. MacGregor v. United States) and 100 S.Ct. 157 (1979). So viewed, Keller's testimony and the corroborating evidence support the conclusion that Jones was an active member of a cocaine-smuggling operation headed by co-defendant Mailliard. Jones did not merely associate with an accomplice, as he con-

tends in his brief; he actually brought the money for the drug purchase with him, contacted the connection, bought the cocaine, and showed Keller how to conceal it. There was evidence that Jones had engaged in such activities before; this evidence, together with the large quantity of cocaine involved, permits the inference that Jones knew his actions were linked to a conspiracy to distribute cocaine in the United States. We conclude that the evidence was sufficient to convict Jones on both counts.

CONCLUSION

The judgment of the district court is AFFIRMED.

FOOTNOTES

1. 18 U.S.C. §2511(a)(c) reads as follows:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where

such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

2. There is evidence, both in Keller's testimony and in the recorded phone calls, that at least some of the appellants let it be known that anyone who betrayed them would face reprisals.

3. Furthermore, Keller himself said that he had been hurt worse in rugby games than by the alleged beating, and he had agreed with the Panamanians to be interviewed by the DEA while still at the airport, before the beating supposedly took place. This casts doubt on the role that fear of further beatings played in his cooperation.

4. Keller testified that when arrested he was afraid of languishing for months in a Panamanian jail, subject to physical abuse, before trial, only to be sentenced to even

longer, equally hazardous imprisonment. Appellant Mailliard had warned him that the Panamanians would use cattle prods on him if he were caught. Keller also said that fear of going to a Panamanian prison was his primary consideration in assisting the DEA not only in Panama but in Guatemala and the United States as well.

5. 18 U.S.C. §§ 2510, 2518 were enacted as parts of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 211.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. ROBERT LEE JONES, Defendant-Appellant.	No. 80-1193 O R D E R

Before: FLETCHER, PREGERSON, and REINHARD, Circuit Judges.

Appellant's petition for rehearing is denied.

FILED
Jul 1 1981
RICHARD H. DEANE
Clerk, U.S. Court of Appeals

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

I am a citizen of the United States, a member of the Bar of the United States Supreme Court, and a resident of the county aforesaid. I am over the age of 18 years and not a party to the within entitled action; my business address is 10100 Santa Monica Boulevard, Suite 2600, Los Angeles, California 90067.

On August 28, 1981, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action by placing three true copies in a sealed envelope, with postage thereon fully pre-paid in the United States mail at Los Angeles, California, addressed as follows:

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

I certify under penalty of perjury that the foregoing is true and correct and was

executed on August 28, 1981, at Los Angeles, California.

/s/

W. MICHAEL MAYOCK
Member of the Bar of the
United States Supreme Court
and Attorney for Petitioner
Robert Lee Jones.